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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JACK TOMPKINS et al., Plaintiffs and Appellants, v. RAMONA AUTO SERVICES, INC., et al., Defendants and Respondents.	E030870 (Super.Ct.No. 276208) OPINION
WYATT KANOHO et al., Plaintiffs and Appellants, v. RAMONA AUTO SERVICES, INC., et al., Defendants and Respondents.	E031073 (Super.Ct.No. 323622) OPINION

APPEALS from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed as modified. (Nos. E030870, E030871, E030872, E030873, E030874 & E030875.) Affirmed. (No. E031073.)

Law Office of Carolyn M. Dunnett and Carolyn M. Dunnett for Plaintiffs and Appellants Jack Tompkins et al.

DesJardins, Fernandez & Smith and Michael A. DesJardins for Plaintiffs and Appellants Wyatt Kanoho et al.

Hanson & Hales, Brent J. Hales and Shaun Hanson for Defendants and Respondents.

In consolidated appeals from judgments in six actions for wages and one action for reformation of a settlement agreement, the appellants establish error only in the cost awards in the wage-action judgments. We modify those judgments to eliminate those awards and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. THE WAGE ACTIONS

Jack Tompkins, Steven Moll, Wyatt Kanoho, Daniel Schoof, Ty Glotfelty, and James Burdette (collectively, the Employees) were employed by Ramona Auto Services, Inc., and Ramona Tire, Inc. (collectively, Ramona). Ramona terminated the Employees' employment. Each of the Employees then filed a complaint with the Labor Commissioner, alleging that Ramona had failed to pay them regular and overtime wages to which they were entitled. After conducting an evidentiary hearing (see Lab. Code, § 98), the Labor Commissioner found in favor of each of the Employees and awarded them unpaid wages ranging from over $12,000 to over $44,000.

The losing party in such a proceeding has the right to appeal the Labor Commissioner's ruling to the superior court, which conducts its own evidentiary hearing de novo. (Lab. Code, § 98.2, subd. (a).) In January of 1996, Ramona appealed the six

rulings in favor of the Employees. All six cases (the wage actions) were then consolidated for purposes of trial. In the wage actions, the Employees were represented by attorney Carolyn M. Dunnett.

Trial commenced January 4, 1999, and continued through January 8, 1999, when it adjourned until January 19, 1999.

Meanwhile, in a separate action entitled *Darrow v. Digby*, Riverside Superior Court case No. 263678, Ramona cross-complained against the Employees and five other former employees of Ramona. In May of 1997, those 11 cross-defendants successfully moved for summary judgment in that action. After prevailing in that action, the six Employees and the other five former cross-defendants then sued Ramona and other parties for relief on theories of malicious prosecution and other claims in an action entitled *Whitescarver v. American Hardware*, San Diego Superior Court case No. 720468 (malicious prosecution action).

When the trial of the Employees' wage actions resumed on January 19, 1999, Ramona immediately moved for judgment pursuant to Code of Civil Procedure section 664.6 on the ground that the wage actions had been settled while the trial had been adjourned. When Dunnett disclaimed any knowledge of any settlement, the court took a brief recess.

Upon resuming, Dunnett produced attorney Michael A. DesJardins. DesJardins informed the court that, at a mediation held the prior week at which he represented the 11 plaintiffs in the malicious prosecution action, the malicious prosecution action had been settled. That settlement was memorialized in a written Agreement of Settlement and Release (Settlement Agreement). However, while that settlement was being negotiated,

DesJardins had informed Ramona's counsel that he could not negotiate a settlement of the wage actions because he did not represent the Employees regarding those claims. Accordingly, it had not been his intention that the general release would extend to the wage actions.

Initially, the trial court deferred any ruling on Ramona's motion for judgment to allow the Employees the opportunity to seek relief from the Settlement Agreement. Later, it denied the motion for judgment.

B. THE REFORMATION ACTION

Meanwhile, in February of 1999, the Employees sought relief by filing an action to reform the Settlement Agreement. (*Kanoho v. Ramona Tire*, Riverside Superior Court case No. RIC 323622; reformation action.) Ramona cross-complained against the Employees, seeking specific performance of the Settlement Agreement and damages for its breach.

Ramona moved for summary judgment on the Employees' complaint in the reformation action in November of 1999 and supplemented its moving papers by filing an amended separate statement of undisputed facts in November of 2000. The trial court denied the motion in January of 2001, finding that there was "a triable issue of fact whether [Ramona] knew or understood that the oral settlement agreement did not release the claims being litigated in the wage cases, and allowed Mr. Desjardins [*sic*] and the employees to sign a writing in the belief that the wage claims were not released."

The following month, Ramona filed a "renewed" summary judgment motion, asserting different facts. (Code Civ. Proc., § 1008, subd. (b).) The renewed motion was directed solely toward the issue identified by the trial court in denying the original

motion, i.e., whether there had been a mutual mistake of fact. After soliciting additional briefing, the trial court granted the renewed motion in June of 2001.

C. THE JUDGMENTS AND THE APPEALS

At a status conference in August of 2001, Ramona asked the trial court to "revisit" the subject of the dismissal of the Employees' wage claims. In response, the trial court dismissed those claims. A judgment was entered in November of 2001.

Ramona filed a memorandum of costs, including attorney's fees, to which the Employees responded with a motion to tax. The trial court entered separate judgments against each Employee for costs and attorney's fees in the sum of $112,224. The Employees appeal from both judgments in each wage action. (Nos. E030870 - E030875.) We consolidated all six appeals for all purposes.

Meanwhile, a judgment in favor of Ramona on the complaint in the reformation action was also entered in November of 2001. The Employees appealed from that judgment. (No. E031073.) Initially, we dismissed that appeal in December of 2002 on the ground that, because the judgment did not resolve Ramona's cross-complaint against the Employees, it was not a final judgment. Later, however, we vacated that order and reinstated the appeal after Ramona conceded that nothing remained to be decided in that action. Since then, we consolidated the appeal from the judgment in the reformation action with the appeals from the judgments in the wage actions.

CONTENTIONS

In the wage actions, the Employees contend that the trial court erred both by granting the motion to dismiss their claims and by awarding costs and attorney's fees to Ramona. In the reformation action, the Employees argue that the trial court erred by

granting the motion for summary judgment. Because the trial court relied upon the summary judgment in the reformation action as the basis for its decision to dismiss the wage actions, we address the challenges to the judgment in the reformation action first.

ANALYSIS

Because a judgment is presumed to be correct, an appellant bears the burden of overcoming that presumption by affirmatively demonstrating from the record on appeal that an error was made. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) For the most part, the Employees have failed to do so.

A. THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT IN THE REFORMATION ACTION.

The reformation of a contract is governed by Civil Code section 3399: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to the rights acquired by third persons, in good faith and for value." Accordingly, to plead a cause of action for reformation, a plaintiff must plead the agreement intended, the agreement as actually reduced to writing, and the ground for reforming that agreement, i.e., the fraud or mistake that caused the written agreement to differ from the intended agreement. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 763, p. 219.)

In their complaint, the Employees prayed for reformation on the basis of fraud or unilateral mistake known to the other side. In particular, they alleged the following facts.

In January of 1999, they were the plaintiffs in two pending lawsuits: Their consolidated wage actions, in which their attorney of record was Dunnett, and their malicious prosecution action, in which their attorney of record was Andy Verne. The attorneys of record for the defendants in the malicious prosecution action arranged a mediation in San Diego on January 14, 1999, before Herbert Hoffman, a retired judge. DesJardins represented the Employees at that mediation. Verne was also present, but apparently Dunnett was not. All but two of the Employees attended. Judge Hoffman succeeded in negotiating a settlement of the malicious prosecution action.

Counsel for Ramona then asked DesJardins if he would help the parties to negotiate a settlement of the wage actions as well. DesJardins declined, explaining that Dunnett represented the Employees regarding those actions. Ramona's counsel knew that neither Verne nor DesJardins intended to represent the Employees with regard to their wage actions and that neither of them were authorized to represent the Employees regarding the wage actions. Nevertheless, Ramona's counsel participated in drafting a release, not only of the malicious prosecution claim, but of all claims, without even attempting to contact Dunnett. Because the Settlement Agreement includes a general release of all claims, it does not accurately record the agreement of the parties. The Employees signed the Settlement Agreement in reliance upon Ramona's representation that it accurately recorded the oral settlement agreement. Ramona knew or suspected that the Employees' assent to the Settlement Agreement was based upon the Employees' mistake as to the scope of the release.

A motion for summary judgment is properly granted if the moving party has shown "that there is no triable issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant establishes that he or she is entitled to judgment as a matter of law by demonstrating "that the action has no merit . . . ." (*Id*., subd. (a).) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (*Id*., subd. (p)(2).)

In its answer to the Employees' complaint, Ramona asserted a variety of defenses. However, Ramona did not seek to establish the existence of any of them in its motion for summary judgment. Instead, Ramona appeared to argue that, by accepting Ramona's performance of its obligations under the Settlement Agreement after learning of their unilateral mistake, the Employees were barred from obtaining reformation. Ramona also attacked one of the elements of the cause of action, by arguing that there was no unilateral mistake of fact or, if there was, Ramona did not know or suspect that the Employees were acting under a unilateral mistake of fact. Ramona also challenged the fraud claim by offering evidence that the Employees did not rely on any representations

from Ramona when signing the Settlement Agreement. As we shall explain, the first ground is dispositive.[1]

1. Ramona's Motion for Summary Judgment Demonstrated that the Employees' Reformation Action Had No Merit Because the Employees Had Accepted the Defendants' Performance under the Settlement Agreement after Learning of the Alleged Grounds for Reformation.

It is undisputed that, after the Employees discovered that Ramona contended that the Settlement Agreement applied to the wage actions, the Employees negotiated the $110,000 settlement check that had been tendered by the various defendants in the malicious prosecution action. That fact is dispositive of the Employees' reformation claim.

"The right to reformation may be waived by failure to assert it at the proper time." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 383, p. 348.) For instance, an executed contract cannot be reformed if the party seeking reformation, after learning of the alleged mistake or fraud on which the request for reformation is premised, nevertheless either performs his or her obligations under the contract as written (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 662-665) or accepts the other

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[1] We emphasize that Ramona's motion addressed only the complaint for reformation. It did not seek summary judgment, either in form or in substance, on the claims alleged in Ramona's cross-complaint for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance. Therefore, the Employees are mistaken when they contend that the trial court found "in favor of the cross-complainants/respondents on their motion for summary judgment as to all three causes of action." Although the judgment on the reformation complaint and the subsequent dismissal of the wage actions rendered Ramona's cross-complaint moot,

[footnote continued on next page]

party's performance knowing that he is relying on the contract as written (*Vantress Farms, Inc. v. Sydenstricker* (1970) 11 Cal.App.3d 943, 950-951). By negotiating the defendants' performance under the Settlement Agreement -- i.e., the payment of $110,000 to the Employees and other plaintiffs in the malicious prosecution action -- after learning both that the release as written applied to all claims and that Ramona was insisting that the release applied to the wage actions in particular, the Employees waived their opportunity to seek reformation.

The Employees attempt to excuse their retention of the benefits of the Settlement Agreement on the ground that the defendants in the malicious prosecution action objected to the return of the settlement funds. But those factual allegations are not before us because the Employees did not raise them in their statement of undisputed facts. For purposes of summary judgment, facts that are not set forth in the separate statement do not exist. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) Besides, even if those facts had been properly raised, the Employees fail to offer any authority or reasoned argument for the proposition that, by objecting to the return of the settlement check (and thereby refusing to a mutual rescission of the contract), Ramona had waived the Employees' failure to seek reformation in a timely fashion.

In short, Ramona's motion for summary judgment succeeded in demonstrating that the reformation action had no merit because the Employees had waived their right to

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[footnote continued from previous page]
Ramona did not seek and the trial court did not grant summary judgment on the cross-complaint.

reformation. Therefore, the trial court properly granted summary judgment unless the Employees are able to establish some error. As we shall explain, they fail to do so.

2. The Trial Court Did Not Err by Considering the Settlement Agreement.

In moving for summary judgment, Ramona relied upon the terms of the written Settlement Agreement. The Employees objected to the admissibility of that agreement, relying on Evidence Code section 1119, et seq. The trial court overruled that objection. The Employees contend that the trial court erred by overruling that objection and considering the Settlement Agreement. They are mistaken.

Generally, "[n]o writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible . . . ." (Evid. Code, § 1119, subd. (b).) But there are a variety of exceptions to that general rule. For instance, a written settlement agreement prepared pursuant to a mediation may nevertheless be admissible if the agreement is signed by the settling parties and "provides that it is enforceable or binding or words to that effect." (Evid. Code, § 1123, subd. (b).)

That exception applies here. The Settlement Agreement provides that it is binding and expressly states that its terms may be disclosed "to enforce the terms of the Agreement . . . ." All parties to the Settlement Agreement have signed it. Nothing more is required under the statute.

The Employees argue that the Settlement Agreement was not signed by all the parties to the mediation because Ramona did not sign it until after the mediation had ended. (Evid. Code, § 1125.) They are mistaken. Although Ramona admits that it did not sign the agreement until later, its signature nevertheless confirms that all parties consented to both the creation of an enforceable agreement and the disclosure of the

terms of the agreement for purposes of enforcing it. Nothing in the statutory scheme suggests that, once the mediation that produces a settlement agreement has ended, a party can no longer give its consent to the disclosure of that settlement agreement. (Cf. Evid. Code, § 1123, subd. (c).)

More generally, however, the admissibility of the Settlement Agreement is a moot point. As noted above, an essential element of a cause of action for reformation is the form of the agreement as it was reduced to writing. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 763, p. 219.) The Employees met that requirement by attaching a copy of the Settlement Agreement to their complaint and alleging that both the Employees and Ramona had signed the Settlement Agreement on January 14, 1999. That allegation of fact is a judicial admission, constituting a conclusive concession of the truth of the matter and removing it from the issues to be decided. (*Uram v. Abex Corp*. (1990) 217 Cal.App.3d 1425, 1433; *Smith v. Walter E. Heller & Co*. (1978) 82 Cal.App.3d 259, 269.) In light of that concession, no evidence was necessary to prove the form or execution of the written Settlement Agreement, and any dispute over the admissibility of that evidence is moot.

3. The Employees Have Failed to Demonstrate either that the Trial Court Erroneously Excluded Admissible Evidence or that any Error Was Prejudicial.

"No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible . . . ." (Evid. Code, § 1119, subd. (a).) The Employees urge us to create an exception to this statutory rule when reformation is sought of the agreement reached as a result of the

mediation. When that exception is applied, they argue, the trial court erred by refusing to allow extrinsic evidence of statements made during the mediation to show that the Settlement Agreement does not express the intent of the parties. Similarly, the Employees contend without elaboration that, even if the evidence of the statements made during the mediation is inadmissible, evidence of "conversations before and after the mediation" creates triable issues.

Any recital in a brief of any matter in the record, concerning either an item of evidence or a procedural event, must be supported by a reference to the exact page or pages in the record at which that matter appears. (Cal. Rules of Court, rule 14(a)(1)(C); *Bernard v. Hartford Fire Ins. Co*. (1991) 226 Cal.App.3d 1203, 1205.) When the appellant fails to comply with that rule, we may both disregard the factual assertion and deem the legal argument premised upon it to have been waived. (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601, fn. 6; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Here, the Employees do not cite us to that portion of the record where any extrinsic evidence was proffered, to any objection to that evidence on the basis of the mediation privilege, or to any ruling on that or any other objection. Accordingly, the point is waived.

Even were we to overlook that waiver, the Employees do not explain how that evidence, if admitted, would demonstrate the existence of a triable issue of material fact. Finally, even assuming that such a triable fact were to exist, they do not explain how that fact would overcome their waiver of their right to reformation. Accordingly, they have failed to demonstrate any reversible error.

4. Ramona Did Not Waive Its Right to Prevent the Admission of Evidence of Statements Made During the Mediation.

The Employees contend that, if they waived their objections to the admission of the Settlement Agreement, then any objection to the admission of evidence of "information" leading up to the execution of that agreement -- presumably, statements made during the mediation -- must also be considered to have been waived. That assertion fails for multiple reasons.

As explained above, we uphold the trial court's decision to overrule the objection to the admission of the Settlement Agreement, not on the ground of waiver, but because the statutory rule of inadmissibility did not apply and because, in any event, the Employees had already conclusively admitted the form of the agreement. Therefore, the factual premise of the Employees' argument is false.

Moreover, even had the argument been well founded in fact, it would have failed on its merits. In substance, the Employees claim that if they waived an objection to some evidence, then Ramona should be deemed to have waived objections to other evidence. That conclusion has no support in either law or logic.

Finally, we note that the Employees make their argument entirely in the abstract, without explaining what evidence was offered in opposition to the motion for summary judgment but was erroneously excluded on the basis of privilege. Nor do they explain how that unidentified evidence, had it been admitted, would have demonstrated the existence of a triable issue of material fact. Therefore, even if they had succeeded in identifying a mistaken ruling by the trial court, they have not demonstrated that the mistake was prejudicial.

5. Whether the Settlement Agreement Is Supported by Adequate Consideration Is Irrelevant to the Summary Judgment on the Reformation Complaint.

Noting that a contract cannot be specifically enforced against a contracting party who did not receive adequate consideration (Civ. Code, § 3391, subd. 1), the Employees argue that there is a disputed issue of material fact as to whether they received adequate consideration for their release of their wage claims.

They are mistaken. As noted above, Ramona did not move for summary judgment on its specific performance claim. Even if it had, demonstrating the existence of a disputed fact that would have prevented summary judgment on that claim does not mean that the trial court erred by granting summary judgment on the reformation complaint.

6. Whether the Settlement Agreement Is Just and Reasonable to the Employees Is Irrelevant to the Summary Judgment on the Reformation Complaint.

A contract that is not just and reasonable as to a party cannot be specifically enforced against that party. (Civ. Code, § 3391, subd. 2.) Relying on that rule, the Employees contend that there is a triable issue of fact as to whether the Settlement Agreement is just and reasonable as to them. Once again, their reliance is misplaced, because the summary judgment motion was granted as to the Employees' complaint for reformation, not Ramona's cross-complaint for specific performance.

7. The Employees Have Waived their Argument that the Trial Court Failed to Consider Facts Regarding Mistake.

Next, the Employees cite the general rule that specific performance will not be granted against a party whose "assent was given under the influence of mistake, misapprehension, or surprise . . . ." (Civ. Code, § 3391, subd. 4.) Citing authority for the proposition that mistake is also grounds for reformation, they conclude without elaboration that "[t]he trial court did not consider these authorities, did not allow these issues to be developed through trial and did not adequately consider them as material issues of fact, which they are."

A trial court's ruling is presumed to be correct. (*In re Sade C*. (1996) 13 Cal.4th 952, 994.) It is not an appellate court's role to construct theories or arguments that would rebut that presumption or otherwise undermine the judgment. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Instead, appellants have the burden to affirmatively demonstrate that an error occurred. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) In particular, appellants must present argument and authority on each point made. (*In re Sade C*., p. 994.) That burden is not satisfied by merely citing general principles of law without reasoned argument explaining how those principles apply to the facts and procedural circumstances before the court. (*Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699.) In the absence of that pertinent argument, the court may deem the issue to have been waived and may pass it without consideration. (*Stanley*, p. 793.) The rule is the same even when the decision of the trial court is reviewed de novo on appeal. We review the trial court's decision independently, but only concerning the issues that have been adequately raised and supported in the appellant's brief. (*Lewis v.*

County of Sacramento (2001) 93 Cal.App.4th 107, 116; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Here, the Employees cite general rules about the effects of mistake but do not apply those authorities to the factual or procedural circumstances presented by the motion for summary judgment. Was Ramona required to make a prima facie showing of the lack of any mistake but failed to do so? The Employees do not make that claim. Was evidence of mistake offered by the Employees but erroneously excluded? The Employees do not tell us. Was there evidence of mistake admitted that created a triable issue of fact? The Employees do not say that either.

We decline to assume the role of an advocate against the judgment. By their silence, the Employees have waived whatever point they were attempting to make in this portion of their brief.

Besides, even if the point had not been waived, and assuming further that there were a disputed issue of fact regarding the existence of a mistake, that dispute would not prevent summary judgment in light of the undisputed fact that the Employees accepted the defendants' performance of their obligations under the Settlement Agreement despite the Employees' knowledge of the alleged mistake.

8. The Employees Have Failed to Demonstrate that the Trial Court Did Not Consider Evidence of Fraud or Unfair Practices.

The Employees also rely on the rule that a contract may not be specifically enforced against any party whose "assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract . . . ." (Civ. Code, § 3391, subd. 3.) They argue

that there is evidence of fraud or at least unfair practices that create "a material issue of fact supporting the defense to the cross-complaint."

To repeat, the summary judgment motion was directed only to the reformation complaint, not to the cross-complaint for specific performance. In the absence of any argument relating this evidence to the issues raised by the summary judgment motion that is the subject of this appeal, the Employees have failed to demonstrate any error. Nor have they demonstrated how any alleged fraud or unfairness relieves them of their waiver of the right to reformation when they accepted the proceeds of the settlement.

9. The Employees Have Failed to Establish a Disputed Issue of Material Fact Regarding the Application of Labor Code Section 206.5.

The Employees argue that the release of their wage claims would violate Labor Code section 206.5. Although mistakenly asserted as another "ground for denying specific performance" because "the general release cannot be enforced as to the labor claims," we consider it as being offered as a basis for reforming the Settlement Agreement.

Labor Code section 206.5 complements Labor Code section 206. "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages . . . conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed." (Lab. Code, § 206, subd. (a).) "No employer shall require the execution of any release of any claim or right on account of wages due . . . unless payment of such wages has been made. Any release required or executed in violation of the provisions of this section shall be null and

void as between the employer and the employee and the violation of the provisions of this section shall be a misdemeanor." (*Id*., § 206.5.)

Read literally and in isolation, as the Employees would do, section 206.5 would prohibit an employer from settling a disputed wage claim by paying the employee a compromise sum in exchange for a release of the balance of the claim. But that construction is incorrect. When read together, these two sections merely mean that, "in a dispute over wages the employer may not withhold wages concededly due to coerce settlement of the disputed balance. An employer and employee may of course compromise a bona fide dispute over wages but such a compromise is binding only if it is made after the wages concededly due have been unconditionally paid." (*Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 207; accord, *Sullivan v. Del Conte Masonry Co*. (1965) 238 Cal.App.2d 630, 633-634.)

Accordingly, Labor Code section 206.5 bars the application of the Settlement Agreement to the wage claims only if Ramona had not previously paid all the wages that Ramona conceded were owed to the Employees.

A motion for summary judgment is properly granted if the moving party has shown "that there is no triable issue as to any *material* fact . . . ." (Code Civ. Proc., § 437c, subd. (c), emphasis added.) Because the only material facts are those that relate to the issues framed by the pleadings (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1432; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381), a defendant moving for summary judgment need address only the issues raised by the complaint (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4).

In their complaint for reformation, the Employees did not allege that the Settlement Agreement is illegal. Nor did they allege anything regarding concededly due wages. Because that factual issue was not raised in the complaint, Ramona was not required to disprove that fact in its motion for summary judgment.

Even if the Employees could create a triable issue by raising a fact that they did not plead, they did not do so. The place to create a factual dispute is in their separate statement of undisputed facts. Nevertheless, the Employees' separate statement says nothing about the degree, if any, to which Ramona had conceded that wages were due to the Employees. By failing to include that fact in their separate statement -- or indeed, to offer any evidence of that fact -- the Employees have failed to establish a disputed issue of material fact regarding the potential application of Labor Code section 206.5.

10. The Trial Court Did Not Fail to Consider the Facts Underlying the Alleged Ethical Violation.

The Employees next argue that the Settlement Agreement should be reformed to exclude the wage claims because Ramona's counsel could not have settled those claims without violating the Rules of Professional Conduct. In particular, they rely on rule 2-100(A), which provides: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

The Employees claim that Ramona's counsel violated this rule and that the trial court failed to consider the effect of that ethical violation. But as noted above, neither the trial court nor an appellate court is required to consider any fact that is not listed in the

parties' respective statements of undisputed facts. (*United Community Church v. Garcin, supra,* 231 Cal.App.3d at p. 337.) Here, neither side's separate statement addressed the facts upon which the Employees base their claim that Ramona violated Rules of Professional Conduct, rule 2-100(A). Therefore, the trial court did not fail to consider anything that it was required to consider when ruling on the motion.

Besides, the Employees waived their right to reformation when they accepted the defendants' performance of the Settlement Agreement after they were aware of the alleged ethical violation.

11. Unconscionability Is Not a Ground for Reformation.

Noting that unconscionability is a defense to the enforcement of a contract, the Employees argue that they should have been allowed to try to establish that defense at trial. But as noted so frequently above, that argument does not address their reformation complaint, appears to be made on the basis of factual claims that are not listed in their statement of undisputed facts, and does not address the waiver of their right to reformation. Therefore, it fails to reveal any error in the ruling on the motion for summary judgment.

12. The Employees Have Waived the Issue of Whether Ramona's Renewed Motion for Summary Judgment Complied with Code of Civil Procedure Section 1008.

Finally, the Employees contend that the "renewed" motion for summary judgment violated Code of Civil Procedure section 1008 because it was not based on new or different facts, circumstances or law. The point has been waived because, as the Employees concede, they did not object on this ground below.

"As a general rule, 'issues not raised in the trial court cannot be raised for the first time on appeal.'" (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417, quoting *Estate of Westerman* (1968) 68 Cal.2d 267, 279.) Instead, the points are deemed to have been waived. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29.) A contrary rule would be wasteful of judicial resources and unfair to opposing parties. (*Id.*, p. 29.)

Some issues, such as objections on the basis of a lack of jurisdiction, may be raised at any time. (*In re Marriage of Lackey* (1983) 143 Cal.App.3d 698, 701.) Whether the failure to comply with the procedural requirements of Code of Civil Procedure section 1008 deprives a trial court of jurisdiction to grant a renewed motion or motion for reconsideration is an open question. (See *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 206-212, and cases cited therein.) But we need not enter that fray. The trial court's error, if any, was not an act without subject-matter or personal jurisdiction, but merely an act in excess of its jurisdiction. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287-291; *People* v. *National Automobile & Casualty Insurance Co.* (2000) 82 Cal.App.4th 120, 125.) Although errors of the former sort cannot be waived (*ibid.*; 2 Witkin, Cal. Procedure (4th ed. 1997) Jurisdiction, § 12, p. 556), errors of the latter sort can be (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6). The Employees did so here by failing to object.

For all these reasons, the Employees have failed to demonstrate that the trial court erred by granting Ramona's motion for summary judgment in the reformation action.

B. THE EMPLOYEES HAVE FAILED TO DEMONSTRATE ANY ERROR IN THE TRIAL COURT'S ORDER ENTERING JUDGMENT IN THE WAGE ACTIONS PURSUANT TO THE SETTLEMENT AGREEMENT.

1. The Employees' Motion to Augment the Record Is Granted.

"A notice designating a clerk's transcript must identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed. . . . For minute orders . . ., it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates . . . ." (Cal. Rules of Court, rule 5(a)(4).) Nevertheless, the Employees' designations simply ask for "[e]ach and every minute order, motion, order and document filed on or after January 19, 1999, . . . including but not limited to" three specifically described documents. In accordance with rule 5, the trial court clerk included little in the clerk's transcript beyond the minute orders and the three documents.

After the briefing was complete, the Employees moved to augment the record with the documents to which the general reference in their notice to prepare clerk's transcript had been intended to refer. Ramona opposes the augmentation.

When the trial court clerk has omitted from the clerk's transcript documents designated by a party, that party may either apply to the reviewing court for augmentation or notify the trial court clerk to certify the missing material and to transmit it to the reviewing court. (Cal. Rules of Court, rule 12(a) & (b).) But there is a diligence requirement. Parties to an appeal should promptly review the trial record upon receipt and, if an omission is discovered, immediately move for augmentation. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 492.) "'Even where the matter sought to be added is

proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons.'" (*Russi v. Bank of America* (1945) 69 Cal.App.2d 100, 102.)

To excuse their failure to move for augmentation in a timely manner, the Employees refer to evidence that their attorney was seriously ill and repeatedly hospitalized for treatment, tests, and surgery from June 2002, when the record was prepared, through December 2002. We also note that, although Ramona opposed the motion to augment, Ramona did not claim that it would be prejudiced were the motion to be granted. We grant the motion to augment to ensure that the Employees do not suffer the consequences of their attorney's omission.

2. The Employees Waived any Objection to the Lack of a Formal Motion.

The Employees claim that the trial "[c]ourt abused its discretion when it failed to require a noticed motion to dismiss . . . ." But by opposing a motion on the merits without objecting to the insufficiency of the notice, the opposing party waives that defect, even if no notice is given at all. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.) The Employees have not cited us to any such objection. Accordingly, the point has been waived.

3. The Employees Fail to Show that the Trial Court Precluded Them from Introducing Relevant Evidence in Opposition to the Motion for Judgment.

The primary rule of contractual interpretation is "to give effect to the mutual intention of the parties as it existed at the time of contracting . . . ." (Civ. Code, § 1636.) When, as here, "a contract is reduced to writing, the intention of the parties is to be

ascertained from the writing alone, if possible . . . ." (Civ. Code, § 1639.) "A court must ascertain and give effect to this intention by determining what the parties meant by the words they used." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co*. (1968) 69 Cal.2d 33, 38.) "The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms." (*Id*., p. 39.) Accordingly, to determine whether parol evidence is admissible, the court should make a preliminary review of the evidence to determine whether "the language of a contract, in the light of all the circumstances, 'is fairly susceptible of either one of the two interpretations contended for . . . .'" (*Id*., p. 40, quoting *Balfour v. Fresno C. & I. Co*. (1895) 109 Cal. 221, 225.)

The Employees contend that the trial court "abused its discretion when it precluded all testimony on the settlement release and . . . made a decision without consideration of extrinsic evidence to allow the parties to explain what the parties meant by the language used in the release." The record does not support that contention.

Ramona moved for judgment twice: on January 19, 1999, and on August 30, 2001. There is no indication in the record that, in either instance, the trial court refused to receive evidence proffered by the Employees.

On January 19, 1999, the trial court specifically invited the Employees to file an opposition "detailing exactly what evidence they believe is admissible concerning the settlement agreement." The Employees accepted that invitation by filing 10 declarations. The Employees have not cited us to anything in the record that indicates that the trial court ruled that those declarations were not admissible or that the trial court otherwise refused to consider them.

Similarly, the Employees have not cited us to anything in the record to indicate that, when Ramona renewed its motion in August of 2001, the Employees asked for the opportunity to present evidence but the trial court precluded them from doing so.

The Employees claim that they made "an offer of proof in declarations and objections," but cite only to pages 19 through 23 of the clerk's transcript. Those pages contain a declaration of Dunnett filed on March 18, 1999, two months after the oral motion was first made. Nowhere in that declaration does she make an offer of proof of evidence as to what the parties meant by the terms used in the settlement agreement. And even if we were to interpret Dunnett's declaration as being an offer of proof, the Employees have not cited us to anything in the record indicating that the trial court foreclosed them from offering the actual declarations to which Dunnett supposedly referred.

Having failed to demonstrate that the trial court either refused to admit evidence or refused to consider the evidence that was admitted, the Employees have failed to demonstrate any evidentiary error.

4. The Trial Court Did Not Err by Granting the Motion for Judgment Despite Dunnett's Absence from the Mediation.

The Employees argue that Dunnett was the sole attorney representing them with regard to the wage actions and that Ramona knew that. They also contend that Ramona knew that Dunnett had not authorized Ramona to communicate with the Employees but that Ramona did so anyway. They conclude that Ramona's counsel violated California Rules of Professional Conduct, rule 2-100 and that the trial court erred by enforcing an agreement that resulted from such unethical conduct.

A trial court's decision to grant a motion under Code of Civil Procedure section 664.6 for the entry of a judgment enforcing a settlement agreement is reviewed for substantial evidence. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) Here, there is ample evidence of the existence of the Settlement Agreement and of the Employees' ratification of the Settlement Agreement by accepting the consideration paid by the settling defendants even after the Employees' knew of the alleged unethical behavior by Ramona. Given that ratification, the trial court did not err by granting the motion for judgment despite the question over the means by which the settlement was reached.

The Employees also claim that, instead of granting the motion for judgment, the trial court should have disqualified Ramona's counsel or imposed some sort of evidentiary sanction. But they did not request any such relief in the trial court. Accordingly, the Employees will not be heard to complain that the trial court did not grant that relief.

5. Labor Code Section 206.5 Does Not Bar the Enforcement of the Settlement Agreement.

As they did in their appeal from the summary judgment in the reformation action, the Employees contend that the enforcement of the Settlement Agreement violates Labor Code section 206.5. They are mistaken.

As explained above, Labor Code section 206.5 bars the enforcement of the Settlement Agreement only if Ramona had not previously paid all the wages that Ramona conceded were owed to the Employees. Here, the Employees have not cited us to any evidence that was offered on that issue. Accordingly, they failed to establish the factual prerequisites to applying that code section.

6. There Is No Evidence of an Attorney's Lien.

Arguing that she has an attorney's lien on the Employees' potential recovery on their wage actions, Dunnett contends that the trial court abused its discretion by enforcing an agreement that has the effect of defeating that lien. That argument fails, for several reasons.

First and foremost, Dunnett does cite to any evidence in the record to support the existence of such a lien. Second, it does not appear that that factual issue was ever raised below. And finally, even assuming that such a lien exists, the party aggrieved by the defeat of that lien would be Dunnett, not the Employees, and Dunnett is not a party to this appeal.

C. THE JUDGMENTS FOR COSTS IN THE WAGE ACTIONS ARE STATUTORILY UNAUTHORIZED AND MUST BE REVERSED.

Citing an attorney's fee provision in the Settlement Agreement, Ramona moved for an award of $112,000 in attorney's fees and costs incurred in the reformation action. Apparently, the Employees moved to strike the cost memoranda that Ramona had filed in the wage actions, arguing that an employer is not entitled to an award of fees or costs in an action under the Labor Code, even when the employer prevails. The trial court agreed and granted the Employees' motion to strike the cost memoranda in the wage actions. With that exception, the trial court granted Ramona's motion for fees and costs in the reformation action.

Despite that ruling, Ramona prepared judgments in each of the six wage actions, finding each Employee separately liable for $112,000 in costs. The Employees appeal, again pointing out that the cost awards to Ramona in the wage actions are statutorily unauthorized. (Lab. Code, § 98.2, subd. (c); *Henry v. Amrol, Inc*. (1990) 222 Cal.App.3d Supp. 1, 7-8; *Dawson v. Westerly Investigations, Inc*. (1988) 204 Cal.App.3d Supp. 20, 24.)

The Employees are correct. Ramona may be entitled to recover its attorney's fees and other costs in the reformation action, but it has no right to recover them in the wage actions. (*Dawson v. Westerly Investigations, Inc*., *supra*, 204 Cal.App.3d Supp. at p. 24.)

DISPOSITION

The judgments in each of the six wage actions (Nos. E030870, E030871, E030872, E030873, E030874 & E030875) are modified by deleting the award of

attorney's fees and costs to Ramona and replacing it with a provision that all parties shall bear their own costs and attorney's fees. As modified, the judgments are affirmed.

The judgment in the reformation action (No. E031073) is affirmed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.